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A Brave New British Citizenry? Reconceptualising the Acquisition of British Citizenship by Children

--Devyani Prabhat and Jessica Hambly

Abstract

This article identifies children's rights as a neglected area in citizenship literature; both in socio-legal scholarship, and in British nationality case law. It analyses reasons for this neglect and posits that there exists a dichotomy in approaches to the wellbeing of children in the UK. The characterisation of children's interests and subsequent obligations owed by states to children are different in nationality law from other areas of law, notably, family law. Through our case study of the registration of children as British citizens, we argue that in the UK formal legal membership may appear achievable 'in the books' but remains elusive in 'law in action'. Children's interests should be just as central to citizenship studies and nationality case law as to family law cases. A new approach to acquisition of British citizenship by children, with the best interests of the child as a critical evaluative principle at the heart of decision-making, will usher in a new era. In the absence of such reconceptualization, children remain passive subjects of nationality law, and their voices are unheard in processes of acquisition of citizenship.

Introduction

17-year-old Jake has lived in the UK from when he was eight years old and attended school in London from Year 3. An outstanding student with A*A A results in Maths and Science subjects, Jake has three university offers to read Physics. His parents came to England from Ghana, and do not have indefinite leave to remain. His father was an 'overstayer' a few years back. Jake's parents approached an immigration lawyer to prepare an application for registration as a citizen at the discretion of the Home Secretary for Jake but they have been told that they should wait a couple of years and then seek naturalisation instead, as his father's lack of settled status may adversely affect the outcome of the discretionary registration application. Nobody has consulted Jake about his citizenship requirements or plans for his future. Meanwhile, without a secure legal status, Jake is not eligible for student loans. He has to pay higher foreign student fees. Without loans, his parents will be unable to support his university education.

Jake's story is not an isolated one. Many young people are still unable to afford university education solely because of their lack of full British nationality or secure immigration status, despite living nearly all their lives in Britain. Like Jake, many have no other national identity

other than their British identity as they have grown up socially and culturally British. Yet legally, they lack the status and rights associated with settled immigration status. Since the children remain unaware of their status until they are applying for loans to fund their university education they are usually 17 or about to turn 18 when they apply for citizenship. However, their sense of identity and belonging is shaped by their long presence as children. In a recent case, (*Tigere* [2015] UKSC 57), the UK Supreme Court has declared this situation to be discriminatory when it takes into account the 'settled' status of children, as many children who do not have 'settlement' are unable to exercise their right to education merely because of their national origin. Despite this judgment, however, there has been little action taken to clarify the law and the plight of children like Jake remains uncertain.

In the UK, the British Nationality Act provides a pathway for regularization through the Home Secretary's discretionary power to register children. For Jake and others like him, however the situation in practice is far from satisfactory. Discretion is rarely exercised in their favour. Thus, although the legal power exists, the British situation highlights the need to think beyond legal capacity on paper and to ensure that legal capabilities are real and robust. In a comparable situation, the US lacks the formal legislation which gives children legal capacity as American citizens. Instead, the challenge there is to put appropriate legislation in place. Proposed federal legislation - the Development, Relief, and Education for Alien Minors (DREAM) Act - aims to fill this gap and facilitate formal legal membership (citizenship or other secure immigration status) for young persons without secure legal status. But as we shall see, like the American DREAMers, British children like Jake and the *Tigere* applicants fall through the cracks in the legal system. We argue that by placing the best interests of children at the heart of nationality and citizenship issues, just as in other areas of law involving children, the wellbeing of long term resident children can be safeguarded. As unaccompanied migrant

children arrive and settle in the UK from conflict areas in the Middle East the issues we address in this article will acquire even greater salience for a large group of children residing in the UK.

We draw from a variety of qualitative data to construct and evidence our argument in this paper. We first present some of the specific issues pertinent to the registration of children as British citizens before analysing the implications of the issues for citizenship theory as a whole. We then suggest an alternative framework for nationality principles for children.

Invisible Children

Conceptions of citizenship so far have not fully included children. Perhaps this is because children are seen as subjects to be protected and preserved rather than as active participants in society (Nakata 2015). Not usually being part of the work force, they are economically dependent, and they lack the ability to participate politically especially when they are without citizenship status (Nolan 2013; Lister, 2008). This leads to their interests being largely overlooked in legal policy making, except when they become troublemakers (such as when they are juvenile offenders) or victims, for example as victims of abuse (e.g., Marsh et al., 2001; Coltrane and Adams, 2003). In other everyday situations, when they are neither the troublemaker nor the victim, they are overlooked. Yet, they are participants in society who engage with others while exercising citizenship rights and carrying out citizenship duties. Writing about children's citizenship rights, Cockburn says in his book *Rethinking Citizenship Rights*, 'both adults and children are socially inter-dependent' through citizens' simultaneous 'responsibilities and duties' (1998b, p. 113). This inter-dependent approach to children in society is missing from their nationality cases.

In society children engage with others at various levels of permissible interaction. Hart's 'ladder of participation' distinguishes different levels at which children are permitted active social participation. Some of these facilitate participation in theory while denying it in actual practice (Hart, 1997). For example, at the lower rungs, children's participation may be reduced to manipulation, decoration or tokenism, meaning they are used in one way or another for adults' own social or political ends. At the higher rungs, however, children can gain increasingly powerful levels of participation through being informed, consulted, taking initiative and, highest of all, sharing in actual decision making (Hart, 1997). At present in British citizenship applications, the participation level of children is only at the lowest rung. The agency of children to act on their own behalf is limited as their capacity to be able to decide on whether they choose to become British citizens is often questioned. We suggest in this paper that children's participation should be at the levels where they can meaningfully make themselves be heard and have their interests fully considered in the citizenship processes. We submit that this can be achieved through a thorough consideration of their best interests in nationality proceedings, as is already the norm in family law proceedings.

Our arguments resonate with existing literature in family studies and models of children's participatory rights under Article 12 of the UNCRC (for e.g. Lundy 2007 with respect to Article 12 UNCRC and children; Eekelaar 2015, Fernando 2014). But citizenship studies literature is mostly silent on the critical aspects of the legal dimensions of children's citizenship rights (with a few exceptions such as Thronson 2006, Piper 2008a and b and Stalford 2000). The bulk of legal writing on children's citizenship is practice oriented, for e.g., about the general rules of acquisition: gaining citizenship by birth, acquiring citizenship through blood links, and how far citizenship, once obtained, can be transmitted inter-generationally. How children acquire citizenship and the standards they are required to satisfy in order to obtain citizenship

are rarely evaluated from a critical perspective. Sometimes discussions about children can be found in works on nationality law but these are mostly afterthoughts in discussions of the processes for, and rights of, adults. There is seldom any analysis of the everyday experiences of children or their links with society. In the rare instances, when children are discussed in relation to their wider role in society, they are projected as 'citizens in the making' rather than as full-fledged citizens in their own right (Moosa-Mitha, 2005). They are considered secondary to the world of adult politics or simply located outside the political field (Kallio and Häkli, 2011). From these viewpoints, it is difficult to obtain critical reflections on how far children's citizenship rights are engaged or, indeed, actualised.

Another shortcoming is that different pieces of literature on citizenship and children's rights seldom engage each other. For instance, Freeman (1998) and Mayall (2000, 2003) have noted a lack of communication between the sociology of childhood literature and writings on children's rights. To some extent the modern children's rights movement is being studied by sociologists interested in childhood but it does not yet form part of wider law and society literature. While American scholars have started writing about the role of children in the DREAM Act movement (for example Keyes 2014) the gap between formal nationality law and nationality legal practice has not been noted in mainstream research in the field of children's rights.

Our case study seeks to transcend disciplinary boundaries to demonstrate how children who identify with a particular nationality and 'belong' to a society may still be excluded from participation as citizens. Despite facially inclusive provisions of law, our case study indicates that routine exclusion takes place without any serious consideration of children's wellbeing.

Socio-legal Lens of Rights, Status, Identity

As children are situated within multiple power relationships that exist in society -family, educational institutions, and wider communities - it may be expected that their citizenship rights be responsive to societal needs and influences (Alanen, 2010; Cockburn, 1998a). Thus, we submit that looking at children's citizenship rights socio-legally is of critical importance and to this end, we undertake a socio-legal analysis of how children acquire British citizenship through the processes of registration.

Joppke's analytical triumvirate of status, identity and rights as constituents of citizenship explain various dimensions of children's citizenship (2010). Status is limited in the sense that it is a narrow legal construction. Identity, on the other hand, is overbroad as it could mean a sense of belonging to any institution, not just to a nation state. Rights are generally highly individualistic in nature. Taken together as a triad, however these concepts are particularly apt for understanding children's citizenship as children readily imbibe identity in their formative years even while they may lack commensurate legal status as citizens. Sometimes they may belong socially in the community in which they reside but may also simultaneously lack legal membership in the country of which they are resident. Further, while children may enjoy the protection of rights in the law in the books (such as through the United Nations Convention on the Rights of the Child and related domestic legislation) they often lack the ability to enjoy the rights in practice because of lack of formal legal membership. Those who acquire social identity as British citizens may neither gain the legal status of citizenship, nor the rights associated with citizenship, such as a right to further and ongoing education.

In order to test how the legal framework with respect to the pathways to citizenship works out in actual practice we have selected as our case study the registration of children as

British citizens. In theory, British legal provisions are inclusive ones as the Home Secretary has wide powers to register children as citizens. The provisions need to be assessed, however, in actual operation and within the context of immigration law more broadly. In the UK, nationality provisions operate in tandem with the selective and exclusionary practices of immigration control so there is always an element of selection and exclusion (Tyler 2010). The focus on immigration control means that citizenship has not been at the forefront of nationality laws in the UK.

The Context for British Citizenship of Children

Fransman (2011) and Dummett and Nicol (1990) explain that little attention has been given to British citizenship in nationality laws owing to the historical privileging of 'subjecthood'. Until the British Nationality Act of 1981 British citizenship did not exist in a defined form in law. This is due to the political context of colonization and the birth of the Commonwealth. The 1948 Commonwealth and Nationality Act had designated the population of Britain as 'subjects of the Crown' and defined the relationship as 'citizenship of the United Kingdom and colonies' (Lester, 2008). Yet, this was also the designation of all the subject populations of the British Empire that chose to be a member of the Commonwealth (e.g., India). It was this status of 'subjects of the Crown' that enabled people from all over the Empire and, later, the Commonwealth, to freely enter Britain and enjoy the same legal status as the other British residents in the country.

Subjecthood emphasises the vertical relationship between subject and sovereign rather than the horizontal relationship between citizens. The subject–sovereign relationship is of allegiance and protection rather than of rights or identity. It is specifically configured around the adult loyal male who would have contributed to the war efforts and obtained the

protection of the sovereign in exchange. This vision obviously did not include children who were generally not engaged in warfare. It was only after the two World Wars that citizenship literature began to grapple with the rights of citizens. An even more recent core concept of citizenship is that of 'belonging' in a society.

After the breakdown of the Empire and the proliferation of the Commonwealth, immigration controls came in and the British legal regime changed drastically (Karatani, 2003). Free movement of former colonial subjects was restricted. When immigration control became the focus of nationality laws, pure *jus soli* (birth citizenship) rules also changed. Thus, the introduction of the British Nationality Act 1981 meant that for the first time, people who had been born in the United Kingdom were not automatically entitled to British citizenship. From then on citizenship became based on having a 'close personal connection with the United Kingdom' (see, White Paper *British Nationality Law: Outline of Proposed Legislation*, presented July 1980). The Standing Committee for the British Nationality Bill, however, explored the importance of registering children whose parents were 'settled' in the UK. It said: 'it is the Government's view that it is in the interests of good race relations in this country that children born to settled parents should be British Citizens.' (HC/OF/SC/229 Hansard: Vol. V – Standing Committees F & G 1980/1981, col 177). 'Settled' in this context meant having a secure long-term status such as Indefinite Leave to Remain or full citizenship. This was because: 'We believe that it is extremely important that those who grow up in this country should have as strong a sense of security as possible.' (19 HC/OF/SC/229 Hansard: Vol. V – Standing Committees F & G 1980/1981, col 177). Different pathways became available after 1981, most significantly naturalisation and two forms of registration (by entitlement and by discretion).

Marshall identified three major groups of rights associated with citizenship: civil, political and social in post-war Britain (1950). The civil and political rights concerning voting

and democratic participation did not apply to children. Marshall's exposition on the social element of citizenship included a variety of rights from the right to economic welfare to a right to share in the social heritage of the country (Joppke, 2010; Stewart, 1995). Arguably, children were included in the conceptualisation and implementation of these social rights. However, their role was as part of the family and wider society, rather than in their own right as individuals with individual rights and interests as citizens. Indeed, in Marshall's work there is no specific discussion about children's citizenship rights.

In contrast to this neglect of children in traditional conceptions of citizenship, studies of children's agency demonstrate how children can be 'active citizens, articulating their own values, perspectives, experiences and visions for the future, using these to inform and take action in their own right and, where necessary, contesting with those who have power over their lives' (Percy-Smith and Thomas, 2010, p. 3). Lister (while critiquing Marshall) argues that children can be included as full citizens only through a 'differentiated universalism' in which being a citizen enables those historically marginalised from power to engage in 'a struggle for recognition' (Lister, 2007, pp. 709, 715). Thus children must struggle first to be recognised as having capacity in law before they can start to develop their capabilities in society. The experiences of young people like Jake and the Tigere applicants, like those mobilizing for the DREAM Act in the US, are instances of developing legal capacity. Belonging and identity may be theirs but status remains elusive without this struggle.

[The Case Study: Registration of Children as British Citizens](#)

To explore the practice of nationality law in relation to children we gathered in-depth qualitative data from interviews with nine legal practitioners, observations at two law centres, and contributions made by 19 stakeholders in a focus-group style workshop on children's

citizenship we organized in London in December 2015. Participation in our project was on condition that we would preserve anonymity and confidentiality of interviewees and those we observed, in line with ethical and data protection requirements. Outside this guarantee of individual anonymity, we agreed that it would be important and useful to talk about one specific research site. The Project for the Registration of Children as British Citizens (PRCBC) is a registered charitable company currently supported by volunteer lawyers and volunteer paralegals. The project holds monthly Saturday sessions where the clients served are mainly children and their families who seek advice on registration and, in some cases, for regularising their immigration status. We observed such sessions to understand the kind of challenges that come up for children and their families in nationality cases.

Our project data consistently highlights the precarious condition of children who are long term residents but not yet citizens. Such children generally acquire full British social identity but fail to obtain the corresponding secure legal status in the UK. In some instances despite acquiring a secure legal status they are unable to fully enjoy their legal rights. Due to family migration reasons or lack of individual full citizenship status, many are unable to enjoy uninterrupted stay within the country. They have restricted access to higher education and are unable to enjoy free movement within the European Economic Area, in a manner that other British children are normally accustomed. Corresponding to this insecurity experienced by children in nationality legal practice is the lack of coherent legal reasoning on children's rights.

Registration as a legal process of gaining nationality introduces many elements of uncertainty for children. There is a lack of awareness of the law and lack of understanding of its technical requirements. A range of factors influence decision making and children lack clarity about these as well as about their own roles in the legal procedures. Uncertainty is also

connected to a sense of helplessness as there is little scope for children to participate and to be heard by decision makers in the nationality processes. Thus they are rendered into passive subjects of the law.

Practitioners experience very different approaches to the wellbeing of children in family law custody cases than in nationality cases. Requirements of 'good character' and scrutiny of the applicant's immigration history are used for deciding these cases. As Anderson has written in her book *Us and Them* (2013) there is an ethos of the 'community of value' which liberal democracies project as important for their socio-political make-up. Legal provisions, thus, aim to separate out the potential 'good' citizens from the 'bad' ones. The 'good' subject will be able to join the 'community of value' while the 'bad' ones are potential liabilities or risk becoming 'failed' citizens whose citizenship may have to be later cancelled.

This framework for assessment of adult conduct and worthiness is superimposed on children to measure children's suitability, despite obvious differences in life situations between children and adults. Thus, the Home Secretary currently applies the same good conduct criteria to children as she does for adults in nationality cases. To further complicate matters, children are rendered passive in nationality matters through a lack of specific reasoning about their wellbeing and a failure to hear their voices in nationality legal proceedings. In their private relations the wellbeing of children is part and parcel of domestic British legal reasoning through the 'welfare principle' in family law. In family law cases the voice of the child is heard by judges either directly, by talking to children, or indirectly, through experts who seek to gauge what would be in their best interest. Domestic legal provisions state that the interests of children are of 'paramount consideration'. In nationality cases, however, there are competing considerations such as sovereignty of the nation state in determining membership of its own

citizenry. Public considerations of security, law and order often act as countervailing forces in determinations of nationality. British citizenship also has its own peculiar institutional character shaped by historical processes that renders it inaccessible to children in practice.

Nationality cases are about documenting and assessing the migration records of the family rather than analyzing the welfare of children in a specific manner. The other connections that children have in British society such as their schools, clubs, activities, and relations of friendship and mentorship are rarely part of deliberations in nationality applications made by children. In this manner, children are confined to being part of the family unit and not given separate consideration as autonomous individuals in their own rights. While being considered part and parcel of their family, they are not heard in the manner that they are in family law cases (such as in custody cases). The law thus places them in a state of maximum passivity in nationality cases.

The Law in the Books

In 1910, Roscoe Pound wrote a seminal article titled *Law in Books and Law in Action* in the American Law Review. Through this distinction between the law as set out formally and as experienced by people, Pound introduced realist jurisprudence and advocated for the use of sociological evidence of the operation of law in society. In our case study, as well, 'law in the books' is quite distinct from 'law in action'. We have mentioned that the law in the books provides for the inclusion of children who are long term residents in the UK. However, in practice there is widespread uncertainty about the law and its application to children. For adults, the most common route to acquire citizenship is naturalization. Children have to wait until they step into adulthood before they can naturalize and as a result lose many precious

years. Registration becomes their default option and they can seek this through entitlement or through executive discretion.

Registration by entitlement applies to someone born in the UK, who has lived continuously in the UK from the time of his or her birth until their tenth birthday. But entitlement does not mean guaranteed citizenship as there is still a requirement to establish 'good character' (under Section 1(4) of the BNA 1981). The process of sorting out potential applicants who can contribute to the 'community of value' is reflected in the requirements of 'good character' (Anderson 2013). 'Good character' has become an important criterion for registering children over the age of ten. This policy was introduced in 2006 before being enshrined in statute (Section 41A BNA) in 2010. This means even registration by entitlement is uncertain for children above the age of ten.

Registration by discretion covers children who do not fulfil all the criteria specified for entitlement. Normally, for children not born in the UK, it takes a long time to qualify (currently 11 years). The discretionary route is, in theory, broad and inclusive as the Home Secretary can potentially consider all kinds of differently situated children through this provision. However, as we shall see, in practice these provisions are interpreted and applied very narrowly, and many children are barred from accessing citizenship rights.

[The Law in Action](#)

Through the law in the books there is potential for inclusion of children as citizens. In practice, however, the pathway to citizenship has become increasingly arduous for most children. Restrictive changes in immigration policies and rules mean that fewer children directly qualify for settled status. Accessible legal advice and assistance for children seeking to

register as British citizens is quite rare owing to legal aid cuts from 1 April 2013. In a recent report, UN Committee on the Rights of the Child Examination of the Fifth Periodic Report of the United Kingdom of Great Britain and Northern Ireland, the UK Children's Commissioners have found that there is severe impact of systematic reductions in legal advice for children and their carers in immigration and nationality matters. Pro bono legal advisers at the PRCBC, for instance, receive an increasing number of enquiries from children on the pathways to citizenship, but can only assist a very limited number of these children as they currently have no funds; all work is being done solely on a pro bono basis.

Owing to their circumstances, children are often forced into the discretionary route for citizenship applications. In these applications, the settlement status of the child's parents is considered important as it is used to gauge whether their 'future clearly lies in the UK'. Case workers and legal advisers are unsure how any past indiscretions by the child or their parents would affect their applications. Case workers, thus tend to be over-cautious and pre-empt applications (sometimes wrongly) if they think that there is less likelihood of success. This kind of pre-screening is an effect of a very strict interpretation of the legislation and reflects similar restrictive interpretations by the Home Secretary. Indeed, in the vast majority of cases before the PRCBC, the child concerned has lived for several years in Britain, fully intends to reside in the UK in the future, and has a clear British identity. Nevertheless, many fail in their discretionary applications. The reasons provided for refusal are often generic, superficial, and not based on the assessment of the individual circumstances of each case.

Danny, 18, has lived in the UK since the age of three. His case is illustrative of the factual circumstances of several PRCBC clients. Danny was not directly entitled to citizenship as his father was not settled in the UK and his mother had returned to her country of birth. The Home

Secretary had the discretion to register children as British citizens but refused Danny's application without proper consideration and without providing adequate reasons. The PRCBC challenged the Home Secretary's decision in the High Court, but rather than fighting the case, the Home Secretary settled it out of court and registered Danny as British. Jake, mentioned in the epigraph to this article, is another example for whom legal advice became of critical importance. In the guidelines there was nothing that preventing Jake from applying for discretionary registration. But initial legal advice received by Jake, telling him to wait for naturalisation, was based on a very narrow reading of the guidelines. Later, while explaining that a favourable outcome was uncertain, the PRCBC advised him to make a discretionary application for registration. Waiting for naturalisation would place his life on hold while he would be unable to pursue higher education. Discretionary registration, on the other hand, would enable him to continue on his track of excellence. Jake's application was eventually successful and he has now started university. Nonetheless, the process of acquiring citizenship was unsettling for him and his family.

Both Danny's case and Jake's case highlight the fact that most PRCBC clients are socially and culturally British even when they lack the legal paperwork to establish British citizenship. These children are high achieving with the clear potential to contribute to British society. Jake's case also illustrates the skewed nature of legal advice which children receive because of a strict and narrow reading of policy guidance. Case workers often tailor their advice to reflect the known difficulties in acquiring citizenship and pre-empt applications because of the high application fees. Case workers are often wary of discretionary registration as the application fees are high and non-refundable. An application made by a child costs £749 at present. This fee is several times more than the cost to process the applications and there are no fee waivers for those children who are unable to afford this amount. A refusal is also difficult to challenge

as the Home Secretary often issues refusal letters without including full and adequate reasons for the refusal. Several letters received by PRCBC clients contain nearly identical reasons for rejection, suggesting a mechanical and bureaucratic approach to these applications. Statements such as 'the child is not settled' and 'sufficient grounds to exercise discretion could not be found' are frequently used in rejections of their application. However, without examining their best interests with reference to their individual life circumstances these reasons do not reflect the context of the lives of the children. As children are normally dependent on the family's circumstances, their situations are not acknowledged separately. While it is true that to the extent that one is looking at whether the child's future lies in the UK it is necessary to ascertain the situation of her or his family, this is just one factor in determining whether the child's future is in the UK.

Our case study findings indicate that there is a significant gap between law in the books and law in action in the area of children's citizenship. This gap exists at various levels of knowledge, experience and practice. For instance, many children remain unaware of their insecure legal status for most of their lives. They believe they are already British citizens because they were born in the UK or have lived here from a very young age. Issues normally arise only when they decide to go on to further education or to go on a school trip abroad or in similar situations when they need documentation of their status.

The most common scenario we encountered in lawyers' offices is similar to the *Tigere* case and to the story of Jake in the epigraph to this article: at the time of applications for university education, the children and their families discover that the children have no secure right to remain in the UK and are not eligible for home student fees and student loans. Confusion is common as sometimes the children have a sibling who has British citizenship or a

parent with a secure status so the family presumes all the children hold British citizenship. Some parents mistake the registration of birth as evidence of citizenship. The children themselves strongly identify as British and most of them are deeply disturbed to find they are not British in law. This makes them feel uncomfortably different from their friends.

While manifested most strongly in the area of university admissions for able children, there is also a general lack of awareness about the rights associated with citizenship and the need to register. Some parents are aware that the benefits of a child having British citizenship as opposed to indefinite leave to remain (settled status), or any other long-term status, is that citizenship gives the child full rights as a UK citizen. The child may not only obtain a British passport but also acquires the rights of a citizen of the European Union. Other statuses, such as Indefinite Leave to Remain, at most confer a right to remain without time restriction. However, generally when one parent acquires a right to remain, families tend to overlook the importance of a secure status for the child, presuming that the child is part of the family and automatically gains similar rights. Children who are looked after by local authorities also risk losing their right to apply to register as British citizens as local authorities often fail to take the necessary steps for these children to register as citizens.

Returning to the triadic socio-legal lens of rights, status and identity, the nature of assessments of children's registration exemplifies that lacking formal status should not hamper child development. The sense of belonging to British society and children's self-identification with this country are also essential ingredients of citizenship. Using Cockburn's (1998b) inter-dependent approach to children's citizenship, the many other links a child has to society - schools, friends, neighbours, community organisations and other networks - should also be given importance. Even when there is an assessment of a child's best interests, at present this

does not properly include the child's own wishes where these are ascertainable. This demonstrates the inability to think of children as autonomous beings, in the arena of nationality and citizenship, despite the developments in formal provisions of the law to respect this autonomy.

The child's welfare is not engaged to the extent that it is in family law. It is possible to argue that this is because the primary purpose of nationality cases is to determine who is, and who is not, a national and that is an exclusive area of national discretion. Yet the discretion in nationality matters is not wholly unrestricted and there are legal boundaries within which state discretion operates even for issues of nationality. Arbitrary denial of nationality or denationalisation is unlawful in international law. We suggest that in *law*, there is no conflict between formal membership of children and the rights of children as existing obligations towards the welfare of children are currently met in the legal provisions. In theory the Home Secretary can give due consideration to a wide range of relevant factors while assessing the situation of children in their nationality applications. However, in *practice*, she rarely gives adequate consideration to the welfare of children while assessing their immigration profile and their potential for formal membership as citizens. Thus, her assessment falls short of the requirements in national and international legal instruments for the wellbeing of children. Such failure reveals much about the lack of concern for children's position in society outside their immediate family circles. On the contrary, if the Home Secretary gives due consideration to the links of children in wider society (school life, clubs, hobbies and activities, friendships and mentoring by other adults) then formal membership will not be a barrier for children.

Overall, it appears that the acquisition of British Nationality is a bureaucratic exercise designed with adults in mind. Adults are tested in their commitment to acquiring citizenship

by being made to commit time and resources to citizenship processes. This is supposed to be part of the social contract. The commitment to get over such challenges can serve to demonstrate that the candidate has earned his or her citizenship. However, this design cannot be adopted for children for whom full participation in British society is critical in the immediate present for their personal development. Their citizenship is the means to an end in achieving full participation rather than the other way around.

Children's Welfare in Family Law and Nationality Law

The UN Convention on the Rights of the Child 1989 (UNCRC) places the duty on all national institutions to consider the best interests of the child as a primary consideration in decision making (Article 3). The duty applies to all areas relevant for children and not just in matters close to family life. However, for several years the UNCRC had no application to immigration and nationality decisions because the United Kingdom had entered a specific reservation in that regard. It is possible that the legacy of this reservation is, at least partly, responsible for the lack of welfare analysis in children's nationality cases.

Recently, there has been a shift towards opening up nationality law to international child welfare obligations. The UK's reservation was lifted in 2008 and Section 55 of the Borders, Citizenship and Immigration Act 2009 was inserted in domestic law to reflect this change. Section 55 places a duty on the Home Secretary, immigration officers and customs officials to have due regard for the need to safeguard and promote the welfare of children while performing any function in relation to immigration, asylum or nationality. The Immigration Act 2014 in Section 71 also clarifies that it would not limit, in any way, duties regarding the welfare of children imposed on the Home Secretary or any other person by Section 55 of the Borders, Citizenship and Immigration Act 2009. The development of domestic law, at least in the books,

now aligns with international law and promotes children's wellbeing in nationality and citizenship matters as it does for family law. Domestic legislation is now also in conformity with the case law on nationality from the International Court of Justice and the European Court of Human Rights. The European Court in the *Genovese* case, (Application no. 53124/09, 11 November 2011), and the International Court of Justice in the *Nottebohm* case, (*Liechtenstein v Guatemala*) [1955] ICJ 1, have both emphasized the importance of nationality. The *Genovese* case sets out that the (access to) nationality falls within the scope of protection of the European Convention on Human Rights (ECHR) as part of a person's social identity, which in turn is part of that person's private life. The *Nottebohm* case underlines the importance of effective connection in determining nationality so it attaches critical importance to identity as a part of nationality. Potentially, states have to show use of greater judgment and consideration while conferring or removing nationality from children than for adults. Despite these developments in law, however, our data indicates there has been no perceptible change in decision making in nationality applications made by children. The decisions continue to neglect the analysis of the rights and interests of children while considering their migration history and family situations.

The scenario in private family law matters is quite different as the welfare of children and their rights are discussed frequently and copiously. For example, in the context of custody of children, the UK Supreme Court has repeatedly expressed the opinion that the best interest of the child has to be considered in the context of the merits of each individual case (*In re K (A Child) (Reunite International Child Abduction Centre intervening)* [2014] UKSC 29;- *In re L (A Child) (Custody: Habitual Residence) (Reunite International Child Abduction Centre intervening)* [2013] UKSC 75; *Re A (Children) (Jurisdiction: Return of Child)* [2013] UKSC 60 and *In re LC*

(*Children*) (*Reunite International Child Abduction Centre intervening*) [2014] UKSC 1). There is no nationality domestic case with a similar focus on best interests of children.

Perhaps, the only way the wellbeing of children has entered into nationality cases is the merging of nationality and family law issues. For example, in *ZH (Tanzania) v SSHD* [2011] UKSC 4 the Supreme Court scrutinized removal from the UK of the mother of British citizen children in relation to interference with the children's right for respect of their family life (Article 8 ECHR). The poor immigration history of the mother came up in the case. The mother had made several false applications to the UK Border Agency, including some claiming asylum. Twice she used a false ID. The basis in which her children were British was through their British citizen father. In 2005 the couple separated and sometime after that the mother, who was the children's primary carer, was threatened with removal from the UK. This raised a quandary about the children's family situation. As well as being British citizens, the children had spent all their lives in the UK. Thus, they had no other relevant national identity. The confluence of nationality law and family life in this case led the court to consider in detail the wellbeing of the children.

In *ZH*, when considering the mother's poor immigration history, the court clarified that a child should not be held responsible for the acts or omissions of her or his parents. Lady Hale said: 'in making the proportionality assessment under Article 8, the best interests of the child must be a primary consideration. This means they must be considered first. They can, of course be outweighed by the cumulative effect of other considerations' (para. 33). The point to be noted here is that while Lady Hale called 'best interests' a primary consideration, her analysis presents it only as one of several factors to be balanced. Her fellow Supreme Court judge, Lord Kerr however elevated the status of the best interests of the child higher in the same judgment. He asserted that a child's best interests 'must rank higher than any other. It is not merely one

consideration that weighs in the balance alongside other competing factors. Where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them. It is not necessary to express this in terms of a presumption but the primacy of this consideration needs to be made clear in emphatic terms. What is determined to be in a child's best interests should customarily dictate the outcome of cases such as the present, therefore, and it will require considerations of substantial moment to permit a different result' (para. 46).

In *ZH*, the core agreement on best interests with regards to the British citizenship of the children, is reflected in Lady Hale's words, 'Although nationality is not a "trump card" it is of particular importance in assessing the best interests of any child' (Lady Hale, para. 30). Further, *ZH (Tanzania)* highlighted the need for the decision maker to endeavour to ascertain the views of the child (in accordance with Article 12 UNCRC). Right after *ZH (Tanzania)*, another judgment in the case of *R (Tinizaray) v SSHD* [2011] EWHC Admin (Admin) confirmed the role which the best interest principle must play. HH Judge Anthony Sultan QC writes in *Tinizaray* that nationality is of particular importance, since deportation would deprive that child of her country of origin and the protection and support that she has acquired socially, culturally and medically from growing up in a British lifestyle, and would also lead to a social and linguistic disruption and a loss of educational opportunities. It needs to be clarified here that *Tinizaray* was not considered a precedent which lays down general principles of law in the subsequent Court of Appeal in *SS (Nigeria) v SSHD* [2013] EWCA Civ 550 (Laws LJ at [55]) and thus has less value as a precedent as compared to the *ZH* case. In *Zoumbas v SSHD* [2013] UKSC 74; there

were very young children involved who had not stayed long enough in the UK but in para. 10 the judges discussed the importance of the best interests of children.¹

Taken together with legislative changes however these new developments seem to indicate that the welfare of the child is of paramount concern in matters relating to nationality and immigration. Yet, this context does not permeate into the decisions about the registration of children as British citizens because the Home Office is generally resistant to the idea that British citizenship, over and above some form of subsidiary leave, is necessarily in the best interests of the child. In decision after decision, the Home Office fails to refer to best interests of the children or their welfare while providing reasons for rejecting their citizenship applications. The Home Office has downplayed the importance of acquiring citizenship over and above a secure 'leave to remain' immigration status. In *FI, R (on the application of) v Secretary of State for the Home Department* [2014] EWHC 2287 (Admin) the Home Office argued that a child (a 16 year old who had lived in the UK since the age of seven) had already been granted Indefinite Leave to Remain, and failing to register as a citizen would not affect his right to live or study in the UK, nor would it affect his everyday life (para. 14). For this reason, claimed the Home Secretary, the boy's best interests had already been taken into account, and the decision to refuse registration was based on the fact that his best interests would 'lie with his family but not to the detriment of current nationality legislation'. The court found this reasoning flawed and held that this was a failure by the Home Secretary to properly have

¹ See also *HH v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25 and *Norris v Government of United States of America* [2010] UKSC 9 [best interests analysis in the context of extradition of parents of children].

regard to the best interests of the boy. The court acknowledged that, although the practical impact of registering the boy as a British citizen may be marginal, 'it is wrong to treat the decision as having no impact on his best interests' (para. 22). Thus the 'best interest' standard has been interpreted by the courts as requiring the Home Secretary to consider more than just simply whether the child can continue to live with his or her family. Instead, the door is left open for considering possible future benefits in terms of education and employment, and perhaps also the 'intangible' or symbolic benefits of British citizenship for children.

Critique and Alternative Framework

We have highlighted through our case study of registration how law in action fails to address the rights of children. In our case study children are rendered doubly passive by their minority status and lack of legal status as citizens. Although their rights are often assumed to be those enshrined in the UN Convention on the Rights of the Child (Alanen, 2010) they cannot enforce these unless the passivity is unmasked. The presence of domestic legislation reinforces the belief that the needs of children are already taken into account but, unless children acquire the status of citizenship, how these play out for different children may be mediated through their nationality pathways. Their rights are affected by their status.

Further, case workers and social workers tend to focus on their conduct and the status and conduct of their parents rather than their other community associations. This may be for two reasons: first, children are considered as indivisible from other family interests; and second, liberal rights systems focus more on individual rights than community relationships so the family is the widest extension of individual rights that usually fits in with this schema. This

view makes it difficult to account for the complexities of human relationships. Children do form parts of families but when the families come from elsewhere they also form part of different communities (Cockburn, 1998a and b).

Even the *Tigere* case [2015] UKSC 57 which emphasised the right to education without discrimination for all children who are residing (lawfully for over three years) in the UK did so without analysis of the best interests of children; instead the court looks at adverse effects on the lives of young people. For example, Lady Hale cites Alison East, of the Coram Children's Legal Centre, in para. 9: 'Our experience ... suggests that young people find not being able to go to university, when that would be a natural educational progression alongside their peers, incredibly difficult. They have worked hard to do well at school and at college, and aspire to achieve the best they can. ... Seeing their friends and peers go to university when they cannot, and being aware of being held back for as long as ten years in pursuing qualifications that are essential in a competitive job market, inevitably causes these young people to feel marginalised. ... They feel that it is deeply unfair as they are not asking for a grant of money but only to be loaned the money which will allow them to progress, alongside their peers, into well-paid work so that they can pay that loan back.' This discussion provides a realistic view into the lives of the young people in general but this is not the same as carrying out a best interest assessment for each individual child affected by a nationality decision.

The law fails to treat children differently from adults and consider their special needs. This prompts us to reconsider the existing framework and suggest an alternative framework for children's citizenship. We submit that legal gaps exist because there is still a failure to actualise the rights of children. As we have seen, in nationality cases the focus is on legal status rather than on rights or on identity and belonging whereas all of these constitute citizenship.

A best interest assessment should ideally look at all aspects of status, identity and rights as all relate to child development. If the best interest standard is applied both in letter and in spirit in nationality cases then children who identify as British and have been here in their formative years will be able to acquire the status and enjoy citizenship rights. This is in line with the general trend in more inclusive status approaches in nationality laws. After all, in the past the dominant image of 'the citizen' was that of a property owning adult male. Later this changed to include all adult males, then to women above a certain age (usually above an age threshold higher than for men) and finally to include all adults (Turner, 1993). In recent times there has been recognition of inequalities which can be perpetuated by nationality laws, such as linking citizenship to legitimacy of birth or linking citizenship with gender. These have been corrected by Parliament. Therefore shifts in societal perceptions about role, identity and rights do bring about shifts in law. But despite the progress in issues related to the rights of children, children's citizenship rights still lie at the periphery of notions of citizenship.

Conclusion

In this article we have demonstrated that children are marginalised in traditional understandings of citizenship. This is puzzling as theoretically it is easiest to agree about the citizenship rights of children who are long term residents. Assessing their best interests in the processes for acquiring citizenship is important so that children who belong to the UK socially and culturally are not held back by any bureaucratic or punitive approach to the acquisition of their legal citizenship.

For this purpose, in this paper we develop a re-conceptualisation of children's citizenship rights by borrowing from the robust approach to the welfare of children and children's participation in family law cases. As we have seen in family law cases the best

interests of children have become of central importance. Cases such as *ZH (Tanzania)* have brought best interests into nationality matters as well, but this is only because of the specific circumstances of the case which places it at the intersection of family and nationality law. Otherwise, children are yet to find their voice in nationality cases. Such a divergence in approaches to children in family matters and nationality matters is without any clear rationale. After all, citizenship is not just about the legal status that ties the citizen to the state; it is also about the social cement that binds citizens to each other, developing a community of people. Children who share cultural and social national characteristics are part of the social cement. Having spent their formative years in a country, they are citizens in every respect but for not having completed the process of registration for bureaucratic reasons.

If the best interests of the child is not the paramount criterion in registration cases then children's rights are not fully protected. While looking at where the '*future clearly lies*' of a child, if the many social and cultural factors which connect the child to British society are not considered, the role of children and adults as interdependent in society is not acknowledged. Further, if requirements of good character are included, these introduce wide discretion into citizenship pathways and bring in elements of uncertainty for children. The use of wide discretion means children do not even reach the application stage in many instances. In this manner children's right to acquire the most secure status of citizenship is diluted.

Children's rights are now better protected than ever before, but there is still a long way to go in terms of citizenship rights. We can see in the PRCBC case study, the best interests of children are still side-lined in practice or limited through interpretation of the law. There is no real recognition of the interdependence of adults and children in nationality laws and cases. Best interest assessment has not yet achieved a central role in nationality cases despite the

dynamic progression of case law. In practice, there are serious problems with the process for registering children as British citizens. Having their citizenship status determined in their best interests would enable them to participate more fully in British society. It would nurture a brave new citizenry.

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